Perbadanan Riadah Sdn Bhd v Setiausaha Kerajaan Negeri Selangor (Perbadanan) & Anor

HIGH COURT (SHAH ALAM) — SUIT NO MT2–21–77 OF 2007
LIM CHONG FONG JC
30 JULY 2014

Contract — Building contract — Breach — Joint venture agreement to carry out housing and industrial development — Failure of defendant in hand over vacant possession of construction site preventing plaintiff from proceeding with construction works — Whether defendant in fundamental breach for failure to afford vacant site possession — Whether premature repudiation of contract by defendant — Whether plaintiff entitled to compensation — Whether payment of land premium by plaintiff condition precedent to giving of vacant possession of land — Whether reciprocal obligation proven — Contracts Act 1950 ss 55 & 76

Contract — Building contract — Project manager — Liability of project manager for breach of building contract — Whether project manager personally and separately liable as agent — Contracts Act 1950 s 183

Contract — Terms — Reciprocal promise — Whether reciprocal or independent obligations — Whether direct linkage or reference connecting both clauses — Whether interdependence in required performance by statutory requirement or commercial norm

Contract — Time — Time for performance — No time frame stipulated for performance of obligation — Whether obligation must be performed within reasonable time — Contracts Act 1950 s 47

By a joint venture agreement dated 7 April 1995 ('JVA') the parties agreed to jointly carry out housing and industrial development ('project development') on a piece of land ('the land'). At that time, sand mining activities were being carried out on the land. The first defendant was the beneficial owner of the land. The first defendant assigned all its rights, benefits and obligations of the land to the second defendant. Since the execution of the JVA, the plaintiff carried out some initial design planning work for the project development on the land. The plaintiff did not proceed with further work because the plaintiff was prevented from undertaking site topographical and contour survey for the project development due to the continuous sand mining activity on the land by Kazabina Sdn Bhd. The sand mining permits were issued to Kazabina Sdn Bhd

with knowledge and approval of the defendants. Despite numerous reminders by the plaintiff, the defendants did not stop the sand mining activity and give the plaintiff vacant possession of the land. However, upon expiry of the JVA, the defendants demanded damages from the plaintiff for failure to embark on the project development. Thereafter, the defendants had stopped the sand mining activity, flattened the land and awarded a new contract to another developer to develop the land. The plaintiff contended that the defendants were in fundamental breach of the JVA for failure to afford vacant site possession of the land to the plaintiff. Accordingly, the plaintiff sought compensation from the defendants. The defendants however contended that they were at all times ready and willing to deliver vacant possession of the land to the plaintiff but the plaintiff was not ready to commence the project development. The defendants claimed that this was corroborated by the plaintiff's failure to pay the land premium required under the JVA.

Held, allowing the claim against the first defendant with cost and dismissing the claim against the second defendant with no order as to costs:

(1) The JVA expired or lapsed on 7 April 2001. Notwithstanding cl 18 of the JVA which prescribed the time but with provision for mutual extension of time, the time for performance was set at large because of the first defendant's substantial failure to give vacant possession of the land. In other words, the plaintiff was no longer bound by the time frame set pursuant to cl 18 but only to complete the project development within a reasonable time. The defendants had in erroneous reliance on the expired original date prematurely repudiated the contract. It was thus a wrongful act of termination of the contract on the part of the defendants. The plaintiff in the circumstances was entitled to pursue for compensation pursuant to ss 76 or 55 or both of the Contracts Act 1950 ('the Act') (see para 27).

(2) The issue of whether the plaintiff was ready and willing to develop is immaterial since vacant possession was not given (see para 29).

(3) It was not expressly stated in the JVA that the payment of the land premium was a condition precedent to the giving of possession of the land. The JVA was comprehensively drawn up. The question of whether payment of the land premium was a condition precedent was not one of implication unlike when a new obligation is sought to be assumed or added to the agreement. The performance of the project development obligations of the plaintiff under the JVA were reciprocal to the first defendant's obligation to give vacant possession of the land (see para 31).

(4) The obligation of the plaintiff to pay the land premium was provided in cl 2(xvii) of the JVA. There was no time frame stipulated; thus it must be performed within reasonable time as per s 47 of the Act. On the other hand, the first defendant's obligation to give vacant possession of the land

was provided in cl 3(iii) of the JVA where it was stipulated that vacant possession must be given within six months from the execution of the JVA. There was no direct linkage or reference connecting both the clauses. In the absence of connectivity and the difference in the timeframe of performance, it was already suggestive that they were meant to be independent obligations. Moreover from the angle of business reality, there was no interdependence seen in their respective required performance by neither statutory requirement nor commercial norm. Hence, they were separate and independent obligations (see para 35).

(5) The plaintiff might be in breach of contract for not paying the land premium and hence liable in damages to the first defendant but that breach did not absolve or excuse the first defendant from its breach of not giving vacant possession of the land. Accordingly, the first defendant was liable to the plaintiff for compensation (see para 36).

(6) The second defendant was more the project manager and agent of the first defendant notwithstanding that the second defendant was also a party to the JVA. There was no evidence led to convince the court that the second defendant should also be found as an agent that was personally and separately liable pursuant to s 183 of the Act (see para 36).

[Bahasa Malaysia summary

Dengan perjanjian usaha sama bertarikh 7 April 1995 ('JVA') pihak-pihak bersetuju untuk bersama-sama menjalankan pembangunan perumahan dan perindustrian ('projek pembangunan') untuk sebidang tanah ('tanah'). Pada masa itu, aktiviti perlombongan pasir sedang dijalankan di atas tanah. Defendan pertama adalah pemilik benefisial tanah. Defendan pertama menyerahkan semua hak, faedah dan obligasi tanah itu kepada defendan kedua. Sejak pelaksanaan perjanjian ini, plaintif menjalankan kerja-kerja perancangan reka bentuk awal untuk pembangunan projek di atas tanah. Plaintif tidak meneruskan kerja lagi kerana plaintif telah dihalang daripada menjalankan topografi tapak dan kajian kontur untuk pembangunan projek itu disebabkan oleh aktiviti perlombongan pasir yang berterusan ke atas tanah oleh Kazabina Sdn Bhd. Permit melombong pasir telah dikeluarkan kepada Kazabina Sdn Bhd dengan pengetahuan dan kelulusan defendan. Walaupun banyak peringatan oleh plaintif, defendan tidak menghalang aktiviti perlombongan pasir dan memberi plaintif milikan kosong terhadap tanah itu. Walau bagaimanapun, selepas tamat JVA, defendan menuntut ganti rugi daripada plaintif bagi kegagalan untuk melaksanakan pembangunan projek. Selepas itu, defendan telah menghentikan aktiviti perlombongan pasir, meratakan tanah dan mengawardkan kontrak baru kepada pemaju lain untuk memajukan tanah itu. Plaintif menegaskan bahawa defendan melanggar asas JVA atas kegagalan untuk memberikan tapak pemilikan kosong tanah kepada plaintif. Oleh itu, plaintif menuntut pampasan daripada defendan. Defendan bagaimanapun menegaskan bahawa mereka adalah pada setiap masa bersedia

dan mahu menyerahkan milikan kosong tanah itu kepada plaintif tetapi plaintif tidak bersedia untuk memulakan pembangunan projek. Defendan mendakwa bahawa ini telah disokong oleh kegagalan plaintif membayar premium tanah yang dikehendaki di bawah JVA.

Diputuskankan, membenarkan tuntutan terhadap defendan pertama dengan kos dan menolak tuntutan terhadap defendan kedua dengan tiada perintah terhadap kos:

(1) JVA tamat atau luput pada 7 April 2001. Walau apa pun klausa 18 JVA yang menetapkan masa tetapi dengan peruntukan untuk lanjutan masa bersama, masa untuk pelaksanaan telah ditetapkan pada besar kerana kegagalan defendan pertama substansial untuk memberi milikan kosong tanah itu. Dalam erti kata lain, plaintif tidak lagi terikat dengan penetapan tempoh itu menurut klausa 18 tetapi hanya untuk menyempurnakan pembangunan projek itu dalam masa yang munasabah. Defendan dengan silap bergantung pada tarikh asal tamat tempoh, telah pramasa menolak kontrak. Oleh itu ia adalah satu perbuatan salah penamatan kontrak di pihak defendan. Plaintif dalam keadaan itu berhak untuk menuntut pampasan menurut Akta Kontrak 1950 ('Akta') ss 76 atau 55 atau kedua-dua (lihat perenggan).

(2) Isu sama ada plaintif bersedia dan mahu untuk membangunkan adalah tidak penting kerana milikan kosong tidak diberi (lihat perenggan 29).

(3) Adalah tidak dinyatakan dengan jelas di dalam JVA bahawa pembayaran premium tanah itu merupakan syarat terdahulu kepada pemberian pemilikan tanah. JVA telah secara komprehensif disediakan. Persoalan sama ada bayaran premium tanah itu adalah merupakan suatu syarat duluan bukan salah satu daripada implikasi tidak seperti apabila obligasi baru dipohon untuk mengambil alih atau ditambah kepada perjanjian itu. Pelaksanaan obligasi pembangunan projek plaintif di bawah JVA itu timbal balik obligasi defendan pertama untuk memberi milikan kosong tanah (lihat perenggan 31).

(4) Obligasi plaintif membayar premium tanah yang telah diperuntukkan di dalam klausa 2(xvii) JVA. Tiada tempoh masa yang ditetapkan; oleh itu ia mesti dilakukan dalam masa yang munasabah mengikut s 47 Akta tersebut. Sebaliknya, obligasi defendan pertama untuk memberi milikan kosong tanah yang telah diperuntukkan di dalam klausa 3(iii) JVA yang mana ia telah menetapkan bahawa pemilikan kosong mesti diberikan dalam tempoh enam bulan dari pelaksanaan JVA. Tidak ada hubungan langsung atau rujukan yang menghubungkan kedua-dua klausa. Jika tiada kesalinghubungan dan perbezaan dalam tempoh masa pelaksanaan, ia sudah menandakan bahawa ia bertujuan untuk menjadi obligasi bebas. Selain itu dari sudut realiti perniagaan, tidak ada saling bergantung dilihat dalam pelaksanaan yang dikehendaki masing-masing, melalui

sama ada keperluan berkanun atau norma komersial. Oleh itu, ia adalah obligasi berasingan dan bebas (lihat perenggan 35).

(5) Plaintif mungkin melanggar kontrak kerana tidak membayar premium tanah dan dengan itu bertanggungjawab untuk ganti rugi kepada defendan pertama tetapi pelanggaran itu tidak membebaskan atau mengecualikan defendan pertama daripada pelanggaran tidak memberi milikan kosong tanah. Oleh itu, defendan pertama adalah bertanggungan terhadap plaintif untuk pampasan (lihat perenggan 36).

(6) Defendan kedua adalah lebih pengurus projek dan ejen defendan pertama walaupun defendan kedua juga merupakan pihak kepada JVA. Tidak ada keterangan menunjukkan untuk meyakinkan mahkamah bahawa defendan kedua perlu juga didapati sebagai ejen yang secara peribadi dan berasingan bertanggungan menurut s 183 Akta (lihat perenggan 36).]]

Notes

For cases on breach, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3880–3918.
For cases on building contract in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3869–4077.
For cases on reciprocal promise, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7327–7328.
For cases on time in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7340–7377.

Cases referred to

Apdin v Austin [1844] 5 QB 671 (refd)
Churchward v R [1865] LR 1 QB 173, QBD (refd)
Duke of Westminister and others v Guild [1985] QB 688, CA (refd)
Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara [2007] 1 MLJ 248; [2006] 4 CLJ 981, HC (refd)
Jones v Barkley (1781) 2 Dough KB 684 (refd)
Juta Damai Sdn Bhd v Permodalan Negeri Selangor Bhd [2014] 5 MLJ 676; [2014] 5 CLJ 318, CA (folld)
Keng Soon Finance Bhd v MK Retnam Holding Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)
Luxor (Eastborne) Ltd v Cooper [1941] AC 108, HL (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)
Stavers v Curling (1836) 3 Bing NC 355 (refd)

Legislation referred to

Contracts Act 1950 ss 47, 52, 53, 54, 55, 76, 183

N Suhendran (Edwin Lim with him) (Edwin Lim Suhendran & Soh) for the plaintiff.
M Indrani (Jamaludin Ibrahim & Assoc) for the defendant.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a contract action for breach of a joint venture agreement to develop a housing and industrial project in Sepang, Selangor.

[2] The plaintiff is a private limited company involved in the business of industrial property development.

[3] The first defendant is an incorporated body of the Selangor State Government pursuant to the Selangor State Enactment.

[4] The second defendant is a private limited company owned by the Selangor State Government.

THE TRIAL PROCESS

[5] By consent of the parties, the trial at this stage is on liability only with damages to be subsequently assessed depending on the outcome of the trial.

[6] The trial was conducted on 9–10 June 2014. The trial documents were marked as Bundles A–D with the documentary evidence wholly contained in Bundle B.

[7] The following witnesses testified at the trial for the respective parties:

(a) Kenny Lim Kah Joo ('PW1') who is a director of the plaintiff; and

(b) Md Yunus @ Iskandar bin Md Noor ('DW1') who was the project manager of the defendants.

[8] After the conclusion of the trial, the parties submitted their respective closing written arguments. There was oral clarification with counsel held on 12 July 2014.

BACKGROUND FACTS

[9] By a written joint venture agreement dated 7 April 1995 ('joint venture agreement') the parties agreed to jointly carry out housing and industrial development ('project development') on the land at Lot 5317, Mukim

Dengkil, Daerah Sepang, Selangor Darul Ehsan ('land'). At that time, sand mining activities were being carried out on the land. A

[10] The first defendant is the beneficial owner of the land for which separate documents of titles were in the process of issuance by the state authority. The first defendant assigned all its rights, benefits and obligations of the land to the second defendant. B

[11] The material terms of the joint venture agreement (where the plaintiff is referred to as the company and the first defendant as the corporation therein respectively) are as follows with the necessary emphasis added: C

> Formal approval by the Corporation of Plans
>
> 2(i) The Company shall within Three (3) months from the date of this Agreement at their own cost and expenses prepare and submit to the Corporation for the Corporation's formal approval the layout plans, elevations, sections, drawings and other relevant plans, if any, in duplicate of the buildings, erections and structures to be put up on the land together with an outline of thespecifications of the proposed method of construction to be employed and the materials to be used. D
>
> Submission of layout plan to the Government Authorities. E
>
> 2(ii) The Company shall immediately upon the Corporation having formally approved the plans as in sub-clause (i) above submit the layout plans of the Housing & Industrial Development to the relevant Government Authorities and shall endeavour to obtain such Authorities approval of the plans. The Corporation undertakes to assist the Company and its endeavour to obtain necessary approvals from the relevant Authorities if its assistance in necessary. Provided that where a delay is occasioned through no fault of the Company the Corporation shall allow the Company such further time as may be reasonable to obtain such approval. Such extension of time given hereunder shall be writing. F
>
> Submission of building plan etc to Government Authorities. G
>
> 2(iii) Upon the relevant Government Authorities approval as in sub-clause (ii) above having been obtained the Company shall submit to the Authorities for their approval of the building plans, elevations sections and drawings or any other relevant plans, if any, for the Housing & Industrial Development. In this respect the Company shall endeavour to obtain such approval. H
>
> Commencement of Housing & Industrial Development
>
> 2(vii) Subject to Clause 6 the Company shall commence to carry out the Development of the land when the approval of the said plans from the relevant Government Authorities above having been obtained and when the Corporation has determined that there are sufficient purchasers for the said Housing & Industrial Development. I
>
> Illegal Occupation.
>
> 2(viii) The Company shall give all the necessary assistance required by the Corporation in its endeavour to overcome any illegal occupation on the said land.

Failure to complete Housing & Industrial Development

2(xi) In the event the Company fails to complete the said Housing & Industrial Development within thirty six (36) months for each phase from the date of commencement of the work thereon, the Company shall be entitled to a further extension of three (3) months. If the Company shall fail complete the Housing & Industrial Development on the expiry of the extended period, the Corporation shall be entitled to terminate this Agreement.

In such event described in Section 2 (vi) above, the Corporation shall enter upon and repossess the said land from the Company and award the said land and the Joint Venture Contract to any other Developer(s) the Corporation deems fit.

Payments of premiums quit rents, assessments, rates etc.

2(xviii) The Company shall pay from the date of this Agreement all premiums, quit rents, rates, taxes claims and assessments and other out goings (if any) now or etc. hereafter at any time chargeable or imposed by the relevant local or other Government Authorities against an owner by statute or otherwise in respect of the land and the Housing & Industrial Development and all erections constructed on the land.

Company not to sell or dispose of earth, etc

2(xx) The Company shall not sell or dispose of any earth, clay, gravel or sand from the land or permit or suffer any of the same to be removed except so far as shall be necessary for the execution of the Housing & Industrial Development PROVIDED that the Company may use for the purpose of the Housing & Industrial Development and without making any payment therefore to the Corporation or to any person or persons other than relevant Government Authorities any of the substances which may be excavated in the proper execution of such works.

Corporation to approve layout plan etc

3(i) For the purpose of Clause 2 (i) the Corporation shall give its approval to any layout plan, elevations, sections designs and such other relevant plans within three (3) month(s) submission to the Corporation by the Company.

Corporation to sign all application etc.

3(ii) To facilitate the Company's applications to the relevant Government Authorities for the necessary approvals under Clause 2 (ii) and (iii), the Corporation shall, if so requested by the Company, sign all applications, plans, elevations, specifications, drawings or any other relevant plans or documents in connections thereto.

Corporation to give vacant possession

3(iii) The Corporation shall give vacant possession of the land to the Company within six (6) months of the execution of this Agreement.

Company to obtain consent etc

17 (i) The Company shall obtain the detailed planning permission and consent under the building regulations and by-laws in accordance with the application for such permission or consent in respect of the land without conditions or with such conditions as the Company at its sole discretion is prepared to accept and the Corporation shall assist the Company to obtain the same whenever possible; and

Company's financial approval

17(ii) The Company shall produce to the Corporation a written approval from financial institution or Institutions agreeing to provide finance sufficient in the opinion of the Corporation for the Company to complete the development of the land including the provisions of loans to the intending purchasers of the residential/commercial/shops/office and industrial premises and industrial land lots comprised in the land.

Period of Agreement

18 This Agreement shall be for a period of six (6) years from the date hereof which period may be extended by the mutual agreement in writing of both parties under this Agreement.

Time of the Essence

20 Time wherever is a requirement in this Agreement shall be of the essence.

(Emphasis added.)

[12] By a further written agreement dated 15 May 1996 ('supplemental agreement'), the parties supplemented several terms into the joint venture agreement particularly on the sharing of entitlements in the project development.

[13] Since the execution of the joint venture agreement, the plaintiff carried out some initial design planning work for the project development on the land.

[14] The plaintiff did not proceed with further work because the plaintiff was prevented from undertaking site topographical and contour survey for the project development due to the continuous sand mining activity on the land by Kazabina Sdn Bhd. The sand mining permits were issued to Kazabina Sdn Bhd with knowledge and approval of the defendants.

[15] The plaintiff or its agents have on numerous occasions by letters dated 18 April 1995, 1 March 1996, 18 March 1996, 26 April 1996, 1 October 1996 and 28 February 1998 wrote to the first defendant and/or second defendant to complaint about the ongoing sand mining activity and action be taken to give the plaintiff vacant possession of the land.

[16] The plaintiff by letters dated 5 March 2001 and 5 April 2001 to the second defendant proposed its desire to continue with the joint venture and convert the project development from industrial to mixed residential development. There was no response from the defendants.

[17] On the date of the expiry of the joint venture agreement, to wit 6 April 2001, the plaintiff had not commenced the physical project development on the land. Nevertheless the plaintiff had obtained the approval of its proposed

layout plan and pre computational plans from the Jabatan Perancang Bandar Dan Desa Negeri Selangor on 28 February 1996 and 5 April 1996 respectively.

[18] The defendants however vide the second defendant's solicitor's letter dated 2 July 2001 to the plaintiff treated the joint venture agreement had expired and demanded damages from the plaintiff for failure to embark on the project development.

[19] Subsequently the second defendant by letter dated 21 August 2001 wrote to Kazabina Sdn Bhd to stop the sand mining activity and to flatten the land.

[20] The defendants thereafter awarded a contract to a new developer to carry out mixed residential development on the land.

THE PLAINTIFF'S CONTENTIONS

[21] Counsel for the plaintiff, Mr Surendran submits that the defendants were in fundamental breach of the joint venture agreement for failure to afford vacant site possession of the land to the plaintiff. In this regard, counsel relied on the court of appeal case of *Juta Damai Sdn Bhd v Permodalan Negeri Selangor Bhd* [2014] 5 MLJ 676; [2014] 5 CLJ 318 where the facts were exactly the same as the facts here.

[22] It is pointed out by counsel that it is plain from the testimony of DW1 that the defendants had allowed Kazabina Sdn Bhd to carry out sand mining activity on the land for over 11 years from 1990–2001. In other words, vacant possession of the land had never been given to the plaintiff throughout the tenure of the joint venture agreement. The land had not been leveled because the defendants failed or neglected to direct Kazabina Sdn Bhd to stop the sand mining activity. In the result, the plaintiff was prevented from carrying out the project development beyond the preliminary planning work. Furthermore the joint venture agreement was wrongfully terminated by the defendants eventually. These were breaches committed by the defendants.

[23] Accordingly, the plaintiff seeks compensation from the defendants.

THE DEFENDANT'S CONTENTIONS

[24] Miss Indrani, counsel for the defendants submitted that the defendants were at all material times ready and willing to deliver vacant possession of the land to the plaintiff but the plaintiff was not ready to commence the project development. In this respect, counsel argued that the plaintiff was actually not keen to embark on the project development due to poor sales response as

explained in the plaintiff's letter of 5 March 2001. This is corroborated by the plaintiff's failure in 1997 to pay the land premium required under joint venture agreement. The plaintiff's excuse of non receipt of vacant possession is thus an afterthought.

[25] Furthermore counsel submitted that the sand mining permits were given to Kazabina Sdn Bhd on a periodical basis and the defendants were able to stop the mining activity as soon as the plaintiff was ready to commence the project development.

FINDINGS OF THE COURT

[26] First and foremost, I have reviewed the court of appeal case of *Juta Damai Sdn Bhd v Permodalan Negeri Selangor Sdn Bhd* and observed that the facts therein were extremely similar to that herein to the extent that it can be regarded as near identical. The project therein was another phase on the same plot of land. Both PW1 and DW1 who testified here testified therein as well. The terms of the joint venture agreement appears to be the same as the agreement therein. The material correspondences relied upon by the parties here including the plaintiff's letters dated 1 March 1996 and 5 March 2001 are also identical *mutatis mutandis* (only in respect of the parties names) to those produced therein.

[27] At clarification with counsel, it is conceded that I am bound by the findings of the court of appeal save only to the extent of any new point raised herein. In *Juta Damai Sdn Bhd*, the court of appeal found that by the failure of the defendant to give vacant possession of the land to the plaintiff within six months as per the joint venture agreement, the defendant therein was liable for breach of contract following s 55 of the Contracts Act 1950.The joint venture agreement herein expired or lapsed on 7 April 2001. The letter of the second defendant's solicitors dated 2 July 2001 confirmed this position and stressed that the joint venture agreement would not be extended due to the plaintiff's failure to carry out the project development. Notwithstanding cl 18 of the joint venture agreement which prescribed the time but with provision for mutual extension of time, I hold that the time for performance was set at large because of the first defendant's substantial failure to give vacant possession of the land; see *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151. In other words, the plaintiff was no longer bound by the time frame set pursuant to cl 18 but only to complete the project developmentwithin a reasonable time. By the second defendant's solicitor's letter of 2 July 2001, the defendants had in erroneous reliance on the expired original date prematurely repudiated the contract. It was thus a wrongful act of termination of the contract on the part of the defendants. The plaintiff in the circumstances would be entitled to pursue for compensation pursuant to ss76 or 55 of the Contracts Act 1950 or both.

[28] The new point that is subject to further consideration here is whether the failure of the plaintiff to pay the land premium excused the first defendant from giving vacant possession of the land to the plaintiff.

[29] As for the facts, I find and hold just as in *Juta Damai Sdn Bhd* that the defendants failed to give vacant possession of the land to the plaintiff pursuant to cl 3(iii) of the joint venture agreement by reason that the defendants continued to allow Kazabina Sdn Bhd to carry out mining activity on the land. The issue of whether the plaintiff was ready and willing to develop is immaterial since vacant possession was not given following *Juta Damai Sdn Bhd*.

[30] It is not a disputed fact that the plaintiff has not paid the land premium notwithstanding that the plaintiff was given an extension until 1998 to make payment. The plaintiff submitted that it is not expressed in the joint venture agreement that the land premium must be paid prior to the delivery of vacant possession of the land to the plaintiff. Furthermore it is contended in reliance on the case of *Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara* [2007] 1 MLJ 248; [2006] 4 CLJ 981 that such a provision must not be implied. In that case Jeffery Tan J (as he then was) said at p 1001: '[26] There is a general presumption against implying terms into written contracts. Rather, the presumption is that parties who have entered into written engagements with written stipulations have expressed all the conditions by which they have intended to be bound under the instrument (*Apdin v Austin* [1844] 5 QB 671; *Luxor (Eastborne) Ltd v Cooper* [1941] AC 108) and care must be taken not to make a contract speak when it was intentionally silent (*Churchward v R* [1865] LR 1 QB 173). The presumption against adding terms is stronger where the contract is a written contract which represents an apparently complete bargain (*Duke of Westminister and others v Guild* [1985] QB 688)'.

[31] It is plain that it is not expressly stated in the joint venture agreement that the payment of the land premium is a condition precedent to the giving of possession of the land. I am mindful that the joint venture agreement is comprehensively drawn up but it is my view that the question of whether payment of the land premium is a condition precedent is not one of implication unlike when a new obligation is sought to be assumed or added to the agreement. The performance of the project development obligations of the plaintiffunder the joint venture agreement are reciprocal to the first defendant's obligation to give vacant possession of the land as observed by the court of appeal in *Juta Damai Sdn Bhd*. Accordingly, it is my view aquestion of construction on the interrelationship amongst the obligations in the agreement that is decisive as to whether the land premium is a condition precedent to the giving of vacant possession of the land.

[32] The law on reciprocal obligations is set out in ss 52–55 of the Contracts Act 1950 which reads:

> 52. Promisor not bound to perform, unless reciprocal promise ready and willing to perform
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> When a contract consists of reciprocal promises to be simultaneously performed, no promisor needs to perform his promise unless the promise is ready and willing to perform his reciprocal promise.
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> 53. Order of performance of reciprocal promises
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> Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the natures of the transaction requires.
>
> 54. Liability of party preventing event on which contract is to take effect
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> When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party so prevented; and he is entitled to compensation from the other party for any loss which he can sustain in consequence of the non-performance of the contract.
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> 55. Effect of default as to that promise which should be first performed in contract consisting of reciprocal promises
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> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non- performance of the contract.

[33] Lord Mansfield in the antiquated case of *Jones v Barkley* (1781) 2 Dough KB 684 said:

> There are three kinds of covenants:
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> (i) Such as one called mutual and independent where neither party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff;
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> (ii) there are covenants that are conditional and dependent — in which performance of one depends on prior performance of another, and therefore, till his prior condition is performed, the other party is not liable to an action on his covenant;
>
> (iii) there is a third sort of covenants which are mutual conditions to be performed at the same time and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered to perform and has fulfilled his engagement,

A may maintain an action for the default of the other though it is not certain that either is bound to do the first act.

In other words, the contractual obligations are independent if performance of that obligation by a party is not conditioned upon the performance of another B reciprocal obligation by the other party; otherwise the obligations are dependent in that performance of the obligation by a party is a condition precedent to the performance or readiness and willingness to perform the reciprocal obligation by the other party.

C **[34]** In *Keng Soon Finance Bhd v MK Retnam Holding Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 MLJ 457, Lord Oliver of Aylmerton held quoting *Stavers v Curling* (1836) 3 Bing NC 355, 368 at p 459 '... the question whether covenants are to be held dependant or independent of each other is to be determined by the intention and the meaning of the parties as it appears on D the instrument, and by the application of common sense to each particular case; to which intention once discovered, all technical forms of expression must give way'.

[35] The obligation of the plaintiff to pay the land premium is provided in E cl 2(xvii) of the joint venture agreement. There is no time frame stipulated; thus it must be performed within reasonable time as per s 47 of the Contracts Act 1950. On the other hand, the first defendant's obligation to give vacant possession of the land is provided in cl 3(iii) of the joint venture agreement where it is stipulated that vacant possession must be given within six months F from the execution of the agreement. There is no direct linkage or reference connecting both the clauses. In the absence of connectivity and the difference in the timeframe of performance, it is already suggestive that they were meant to be independent obligations. Moreover from the angle of business reality, there is no interdependence seen in their respective required performance by G neither statutory requirement nor commercial norm. There is no evidence led by the defendants on the latter.

[36] In the circumstances, I therefore find and hold that they are separate and independent obligations. The plaintiff might be in breach of contract for H not paying the land premium and hence liable in damages to the first defendant but that was not counterclaimed in this action. However that breach does not absolve or excuse the first defendant from its breach of not giving vacant possession of the land. Accordingly I find and hold that the first defendant is liable to the plaintiff for compensation as found in para [27] herein. I further I find that the second defendant was more the project manager and agent of the first defendant notwithstanding that the second defendant was also a party to the joint venture agreement. There is however no evidence led to convince me that the second defendant should also be found as an agent that is personally and separately liable pursuant to s 183 of the Contracts Act 1950. I am aware

that Perbadanan Negeri Selangor Bhd ('PNSB') was found liable in *Juta Damai Sdn Bhd* but it could not be discerned from the judgment the capacity and extent of PNSB's involvement in the joint venture agreement therein.

CONCLUSION

[37] Since I have found the first defendant liable to the plaintiff, I hereby accordingly order that the compensation in damages and interests be assessed by the registrar. The claim against the second defendant is dismissed with no order as to costs.

[38] I further order costs up to this stage of the trial amounting to RM30,000 be paid by the first defendant to the plaintiff.

Claim against first defendant allowed with costs and claim against second defendant dismissed with no order as to costs.

Reported by Kanesh Sundrum